the ground that in the portion italicized the court invaded the function of the jury. On error, it was *held* (Robinson and Wanamaker, JJ., dissenting) that the instruction was proper. *Howell* v. *State,* (Ohio, 1921), 131 N. E. 706.

The dissenting judges took the view that by the action of the legislature there had been vested in the jury, so far as choice between punishment by death and life imprisonment was concerned, a discretion wholly unlimited and beyond the court's control. They also disagreed with the majority in the interpretation of *Winston* v. *United States,* 172 U. S. 303, 19 Sup. Ct. 212, 43 L. Ed. 456, a case much relied upon in the prevailing opinion, and in which are to be found pronouncements favoring each side. The weight of authority is probably with the court's decision. *Inman* v. *State,* 72 Ga. 269; *Duncan* v. *State,* 141 Ga. 4; *State* v. *Bates,* 87 S. C. 431; *State* v. *Carrigan,* (N. J.), 108 Atl. 315. Squarely opposed to the prevailing view is *Vickers* v. *United States,* 1 Okl. Cr. 452. Among the cases that may be cited as supporting the dissent, but which are found on close examination to be either mere dictum or standing merely for the doctrine that the court must not attempt to tell the jury *how* to exercise their discretion, are *People* v. *Kamaunu,* 110 Cal. 609 (see *People* v. *Ross,* 134 Cal. 256; *People* v. *Rogers,* 163 Cal. 476); *State* v. *Thorne,* 39 Utah 208 (see *State* v. *Mewhinney,* 43 Utah 135); *State* v. *Ellis,* 98 Oh. St. 21. Since the judge in cases where the legislature has fixed only minimum and maximum penalties exercises an uncontrollable and unreviewable discretion in passing sentence, it is reasonably arguable that the jury in such a situation as was presented in the principal case should have a like freedom: if the judge in the former case may be guided in fixing sentence by what has come to him, let us say, in a vision, why should the jury in the latter case be confined to the facts and circumstances of the case as disclosed by the evidence?

INSURANCE—EFFECT OF DEATH OF INSURED BEFORE THE PERIOD SPECIFIED BY THE "INCONTESTABILITY" CLAUSE EXPIRES.—An insurance policy read: "This policy shall be incontestable after one year from its date except for non-payment of premiums." The insured died within the year. Action was brought on the policy and the insurer defended, alleging false warranties of the insured in answering questions material to the risk. The answer was not filed until after one year from the date of the policy. Plaintiff contended that the defense was barred by the operation of the above clause. Defendant contended that the rights of the parties became fixed at the death of the insured, and since the policy was then contestable it should continue so indefinitely; hence, false warranties should avoid the policy. *Held,* admitting the existence of fraud, the clause continued operative after the death of the insured, the time within which to contest the policy had expired, and plaintiff may recover. *Plotner* v. *Northwestern National Life Insurance Co.,* (N. D., 1921), 183 N. W. 1000.

The question involved is nearly new. It is well settled that the "incontestable" clause will bind the insurer even in the face of fraud if the period stipulated has run before the death of the insured. See cases cited in 6 A. L. R. 448. But when, as in the principal case, the insured dies before the

period expires, there are two possible conclusions, first, that the clause continues operative, thus compelling the insurer to contest the policy within the agreed period if at all, or second, that the rights of all the parties to the contract become fixed and determined at the death of the insured, and if the policy is then contestable it will remain so indefinitely. Authority in point is meagre, but that which exists clearly favors the former alternative. In *Prudential Insurance Co.* v. *Lear,* 31 App. D. C. 184, the insured died within the stipulated period. In discussing the case the court used language which clearly indicated that in their minds the clause continued operative after his death. However, the decision for the plaintiff did not turn on the point, for the defendant failed in his proof of fraud. In *Monahan* v. *Metropolitan Life Insurance Co.,* 180 Ill. App. 390, the appellate court adopted the second alternative and held that the rights of the parties became fixed as they stood at the death of the insured. However, this ruling was reversed when the case reached the Illinois Supreme Court (119 N. E. 68), the court saying that to limit the operation of the incontestability clause by requiring the agreed period to expire during the life of the insured, if at all, was unwarrantably to read additional words into the policy. Recently, in *Ramsey* v. *Old Colony Life Insurance Co.,* (Ill., 1921), 131 N. E. 108, the earlier supreme court decision was followed, and it may now be regarded as settled law in Illinois that the incontestability clause continues operative no matter when the insured may die. In *Ebner* v. *Ohio State Life Insurance Co.,* (Ind.), 121 N. E. 315, the same question arose upon a bill in equity for cancellation of a policy for fraud brought by the insurer after the death of the insured, but two days before the expiration of the period stipulated. The court in decreeing cancellation said that although ordinarily a bill in equity would not lie after the death of the insured because the insurer had an adequate defense at law to an action on the policy, yet in this case the remedy at law was not adequate because the incontestability period was still running. The beneficiary might not sue on the policy until after the stipulated period had expired. So this case necessarily supports the Illinois decisions and in addition the court expressly cites them with approval. "Incontestability" clauses are becoming increasingly numerous. They make good selling arguments for insurance agents. Furthermore, they are now required by statute in many states. It is to be expected that more cases in point will soon appear. A reasonable construction of the plain words of such clauses demands that the conclusion of the principal case prevail unless the clause expressly provides that the agreed period shall run its course during the lifetime of the insured.

LAW OF NATIONS—CONFISCATION OF ENEMY PRIVATE PROPERTY—WHEN USAGE DEVELOPS INTO BINDING CUSTOM.—After the conclusion of the armistice between Great Britain and Bulgaria, an inquisition was held and certain stocks and securities belonging to Ferdinand, former Tsar of Bulgaria, were declared forfeited to the Crown. Ferdinand appealed. *Held,* that the Crown has the right, under the common law, to seize and forfeit enemy private property found within the realm, but that this common law